CHERN YEN MING @ CHIN YOON MEN & ANOR. *a*

v.

TENG IK NGEE CONSTRUCTION SDN. BHD. & 3 ORS. (CHERN BOON HONG & ANOR., THIRD PARTIES) *b*

HIGH COURT MALAYA, JOHOR BAHRU
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[CIVIL SUIT NO. 484 OF 1982]
29 OCTOBER 1995

PRACTICE & PROCEDURE: *Third party proceedings - Refusal by Court to give directions - Effect - Whether third party notice became a nullity - Whether proceedings put to an end.* *c*

PRACTICE & PROCEDURE: *Appeals - Appeal to Judge in Chambers - Delay - Defendants filing notice of appeal within time frame allowed by Rules - Notice issued by Court 10 months after time lapsed - Whether fatal - Duty of solicitors - Whether solicitors duty bound to ensure Form 114 issued by Court within 5 days after decision appealed against - Order 56 r. 1(3) Rules of the High Court 1980 - Whether a mandatory provision - Whether to be strictly applied.* *d*

WORDS & PHRASES: *"Issued" - Order 56 r. 1(3) Rules of the High Court 1980.* *e*

The third and fourth defendants herein had applied for third party directions to enable them to serve their statement of claim on the third parties. On 25 November 1992 the summons was heard and dismissed by the learned Registrar, and five days later, on 30 November 1992, the defendants' solicitors filed a notice of appeal to the Judge in Chambers. The filing of the notice met the time frame allocated for such filing by the Rules, but the notice, however, had not been issued by the Court until 10 October 1993, i.e, some 10 months later. At the hearing of the appeal, Counsel for the third parties raised an objection that the appeal, having been issued outside the time frame allowed by O. 56 r. 1(3) Rules of the High Court, 1980, was improperly brought before the Court. Counsel for the defendants argued that the appeal, having been lodged on 30 November 1992, was filed within time, but that the Court had delayed issuing the notice, thereby causing the delay. Counsel thus attributed the blame to the Court. The sole issue that arose was whether the delay was still fatal in the circumstances. *f* *g* *h*

Held:

[1] To contrue the meaning of the word "issued" under O. 56 r. 1(3) of the RHC, it would be when the notice of appeal to the Judge in Chambers is actually signed, sealed and dated by the Court. It is only when such *i*

notice is so signed, sealed and dated that it is deemed to be issued, and it is on that date that the Court must construe that it was issued.

[2] In the present appeal, it can be safely argued that time runs on 25 November 1992. However, although the defendants, by filing the notice of appeal on 30 November 1992, had complied with O. 56 r. 1(3) that such notice be filed to the Judge in Chambers within 5 days after the decision, the key issue here hinges on the time when the said notice was issued by the Court. On the facts there is a protracted delay of nearly one year after the Registrar had given his decision.

[3] The primary responsibility rests with the solicitors for the third and fourth defendants to ensure that the Court issued the notice in Form 114 within 5 days after the decision appealed against. It is their legal duty to see to it that the strict provisions of the O. 56 r. 1(3) of the RHC have been observed, if need be by pursuing the matter with the relevant Court officer. The Court is totally blameless and it is an exercise in futility to put the blame to the Court in issuing the notice on 10 October 1993. The mandatory provisions of O. 56 r.1(3) of the RHC had not been complied with, the consequent result would be that this appeal is not properly put before this Court.

[4] The effect of a refusal to give directions is to make the third party notice a nullity and to put an end to the third party proceedings. It follows that, here, by the Court acceding to the preliminary objection, the third party proceedings against the third parties were put to an end.

[Appeal dismissed].

Cases referred to:
Gooi Seang Tuck v. Tan Peng Loon & Anor. [1959] 25 MLJ 153 ***(foll)***
Boota Singh v. Isman bin H. Ali [1957] 23 MLJ 127 ***(foll)***
Courtenay-Evans & Anor v. Stuart Passey & Associates (a firm) & Anor (Greater London Council, Third Party) [1986] 1 ALL ER 932 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 6 r. 6(3), O. 56 r. 1(3)
Rules of the Supreme Court 1965 (UK), O. 14, O. 16 r. 4, O. 58 r. 1(3)

For the 3rd. & 4th. defendants - Ang Boon Heng; M/s. H.H Long & Co.
For the third parties - Ho Thian Cheh; M/s. Ho Thian Cheh & Co.

JUDGMENT

Abdul Malik Ishak J:

On 25 November 1992, the Senior Assistant Registrar heard in Chambers the summons for third party directions (enclosure 112) by the 3rd and 4th defendants for them to serve a statement of their claim on the third parties

within thirty (30) days and who shall plead thereto within that period of time. After hearing the submissions of the parties thereto, the Senior Assistant Registrar dismissed enclosure 112 on the same day with costs. Aggrieved by that decision, the 3rd and 4th defendants filed a notice of appeal to the Judge in Chambers against the whole decision of the Senior Assistant Registrar that was handed down on 25 November 1992.

Before me on 28 October 1995, Mr. Ho Thian Cheh, the learned Counsel for the third parties, raised a simple and straight forward preliminary objection. It was argued that the appeal was not properly brought before me as it was issued by the Court 10 months 10 days outside the time frame as allowed by O. 56, r. 1(3) of the Rules of the High Court, 1980 ("RHC"). Mr. Ang Boon Heng, the learned Counsel for the 3rd and 4th defendants, argued that they had lodged the appeal within time and this was on 30 November 1992, but the Court delayed in issuing the notice and, consequently, the blame should be with the Court.

Order 56 of the RHC reads as follows:

> 1 (1) An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar.
>
> (2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice in Form 114 to attend before the Judge on a day specified in the notice.
>
> (3) Unless the Court otherwise order, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less than 2 clear days before the day fixed for hearing the appeal.

Since the Senior Assistant Registrar gave his decision on 25 November 1992, the last day for filing the notice of appeal to the Judge in Chambers would be within five (5) days after that decision and this would be on 30 November 1992. This was complied by the solicitors for the 3rd and 4th defendants. But the key issue to be decided must surely hinge on the question of: When was it issued by the Court? At page 6 of bundle of documents, the date of issue was stated as 10 October 1993, and if calculated from 30 November 1992 the delay would be as stated above, 10 months 10 days. Would that delay be fatal?

It is significant to note that the meaning to the word "issued" appearing in O. 56, r. 1(3) of the RHC is of great importance. The Malay version of sub-rule(3), r. 1 of the O. 56 of the RHC uses a strong language like "mestilah di keluarkan" and for convenience it is reproduced below :

> (3) Melainkan jika di perintahkan selainnya oleh Mahkamah, notis itu **mestilah di keluarkan** dalam masa 5 hari selepas penghakiman, perintah atau keputusan

> yang rayuan di buat terhadapnya itu telah diberi atau dibuat dan di sampaikan tidak kurang dari 2 hari genap sebelum hari yang di tetapkan untuk pendengaran rayuan itu.

By way of an analogy, Rigby J. in *Gooi Seang Tuck v. Tan Peng Loon & Anor.* [1959] 25 MLJ 153, on the question of an appeal from a decision of the Registrar refusing leave to the appellant to defend proceedings brought against him under O. 14 of the Rules of the Supreme Court and giving the respondent leave to sign final judgment against him on the claim, had this to say:

> As a matter of practice, however, it is as well that advocates and solicitors should note that the primary responsibility rests with them to ensure that the notice of appeal in such matters should not only be taken out but also be made returnable within the period of five days.

Again, by way of an analogy under O. 6 r. 6(3) of the RHC, the issue of the writ only comes into being when the Registrar assigned a serial number to the writ and of relevance when he signed, sealed and dated the writ. Now, even though the words like "signed, sealed and dated" do not appear in O. 56 r. 1(3) of the RHC, yet on perusal of Form 114, I venture to say that in construing the meaning of the word "issued" the usual salutations of "signed, sealed, and dated" should be attached to it. After all the word "seal" appears at the bottom portion of Form 114 just above the word "Registrar". Now, if such salutations apply, the date appearing at page 6 of the bundle of documents, namely, 10 October 1993 reflected a protracted delay of nearly one year after the Senior Assistant Registrar had given his decision.

In *Boota Singh v. Isman bin Hj. Ali* [1957] 23 MLJ 127 the question that arose for decision there was whether the Limitation Ordinance ceases to run when the plaintiff requests the Court clerk to prepare the summons or whether it continues to run until the summons is actually sealed and issued. It was held by Whyatt CJ that the Limitation Ordinance continues to run until the summons is actually sealed and when the summons is sealed it is deemed to be issued and the action is then commenced. Applying *Boota Singh's* case, it can safely be argued that time runs in the present appeal on 25 November 1992 and to construe the meaning to the word "issued" under O. 56, r. 1(3) of the RHC it would be when the notice of appeal to the Judge in Chambers is actually signed, sealed and dated and when such notice is signed, sealed and dated then it is deemed to be issued and it is on that date that the Court must construe that it was issued. The primary responsibility rests with the solicitors for the 3rd and 4th defendants to ensure that the Court issued the notice in Form 114 within five days after the decision appealed against. It is an exercise in futility to put the blame to the Court in issuing the notice on 10 October 1993. The Court is totally blameless. It is the legal duty of the solicitors for the 3rd and 4th defendants to observe the strict provisions of O. 56, r. 1(3) of the RHC. If need be, it is the duty of that solicitors to pursue

the matter of issuing the notice within time with the relevant Court officer and this must surely be the best way to comply with the stringent requirements of O. 56, r. 1(3) of the RHC. It is germane to note that the English O. 58, rule 1 (3) of the RSC 1965 (The White Book) which is *in pari materia* to our O. 56, r. 1(3) of the RHC is vividly explained in these terms (see page 833 of the White Book):

> The appeal is brought by way of a notice to attend before the Judge on a day specified in the notice. If the appeal is to be heard in London, the notice is issued out of the Action Department of the Central Office, and it must be issued, unless the time is enlarged, within 5 days from the decision complained of, and served on the opposite party not less than 2 days before the day fixed for hearing the appeal. If for any reason the appeal is not or cannot be heard on such date, it may be heard later without extension of time.

For the foregoing reasons, I am impelled to conclude that the mandatory provisions of O. 56, r. 1(3) of the RHC have not been complied with and the consequent result would be that this appeal is not properly put before me. The up shot of it would be that the appeal to the Judge in Chambers in enclosure 116 was dismissed with costs without having to go into the merits of the appeal. As Judge John Newey QC said, *inter alia*, in *Courtenay-Evans and Anor. v. Stuart Passey & Associates (a firm) and Anor. (Greater London Council, Third Party)* [1986] 1 All ER 932 that where a party who is the subject of a third party notice is able to show that special circumstances exist why third party directions under RSC O. 16, r. 4 ought not to be given, e.g because of delay in bringing the third party proceedings, the Court may refuse to give such directions. The effect of a refusal to give directions is to make the third party notice a nullity and to put an end to the third party proceedings. Here, by acceding to the preliminary objection as raised by Mr. Ho Thian Cheh, the third party proceedings against his clients were put to an immediate end.